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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-674

Nos. 257, 258, 259

MINNESOTA MINING & MANUFACTURING COMPANY,

Petitioner,

vs.

CONWAY P. COE, COMMISSIONER OF PATENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

PAUL CARPENTER,
HAROLD J. KINNEY,
Counsel for Petitioner.

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MINNESOTA MINING & MANUFACTURING COMPANY,

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CONWAY P. COE, COMMISSIONER OF PATENTS,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Minnesota Mining & Manufacturing Company, by its undersigned attorneys, respectfully prays that three Writs of Certiorari issue to the United States Court of Appeals for the District of Columbia to review the judgments of that court entered on December 30, 1940, in three appeals (Nos. 7539, 7540 and 7541) all entitled as above, affirming the Judgments of the District Court in which petitioner's Complaints were dismissed as to all *except two* of the claims for letters patent in issue (R. 90,

215 and 282). (Said causes were consolidated for purposes of trial, and for argument on appeal.) A petition for rehearing (R. 312-321) was filed and was denied February 12, 1941, *one of the Justices repeating his dissent on the merits,* however (R. 334).

A transcript of the record, including the proceedings in the said United States Court of Appeals for the District of Columbia, is furnished herewith in accordance with Rule 38 of this Court. The time for filing this petition has been extended by this Court (R. 341).

Short and Summary Statement of the Matter Involved.

This Court need not necessarily be concerned about the facts, because the parties are not in disagreement as to the essential facts, which are set out satisfactorily, though in rather brief form, in the Opinion of the United States Court of Appeals for the District of Columbia (R. 308). However, the main facts are here set out, as follows:

Three patent applications are here involved, two applications of Byron J. Oakes and one application of Howard G. Bartling. Each is directed to an abrasive article, especially a flexible abrasive article of the coated abrasive type, commonly referred to as "sandpaper", though adapted to be used in various forms such as abrasive belts, etc. The gist of the inventions is a new flexible abrasive article of the coated abrasive type, which is bonded with vinyl polymers or resins. It is admitted by the appellee-respondent that this is new in the art and definitely useful. Advantages of the construction over prior art constructions are set forth reasonably adequately in the appellate court's opinion (R. 308).

One Oakes application was filed in the United States Patent Office on August 24, 1931 as Serial No. 558,872. The other Oakes application was based directly on the former

and was filed in the U. S. Patent Office on September 2, 1938, as Serial No. 228,188, in order to present other and differently worded claims.

The Bartling application was filed in the U. S. Patent Office on October 6, 1933 as Serial No. 692,436, the same being based directly on the earlier Bartling application, Serial No. 372,549, filed June 20, 1929.

For convenient reference, the relation of these patent applications to the equity numbers in the trial court, and the appeal numbers in the Court below, is as follows:

(1) Oakes Serial No. 228,188—Civil Action No. 851—Appeal No. 7539;

(2) Oakes Serial No. 558,872—Equity No. 63,916—Appeal No. 7540; and

(3) Bartling Serial No. 692,436—Equity No. 63,261—Appeal No. 7541.

All the claims of each of said applications were rejected as unpatentable by the Patent Office (R. 63, 210 and 276) and petitioner, as assignee of Oakes and also of Bartling, brought suits against the Commissioner of Patents under Revised Statutes, Sec. 4915, as amended by the Acts of March 2, 1927 and March 2, 1929, 35 U. S. C. 63 (Appendix, p. 26) in the District Court of the United States for the District of Columbia, praying that the Commissioner of Patents be authorized and directed to issue to it Letters Patents including the rejected claims of the aforesaid Oakes and Bartling applications (R. 3, 138 and 250). That Court, in judgments dated June 21, 1939 (R. 90 and 215) and June 26, 1939 (R. 282) dismissed petitioner's complaints as to all *except two* of the claims in issue (R. 90), holding that the claims were unpatentable over a combination of prior art patents. The two claims held patentable by the District Court, i. e. claims 4 and 5 of Oakes S. N. 228,188 (R. 3),

bear a considerable analogy to other claims held unpatentable, and the legal basis on which said claims were held patentable is also generally applicable to claims held unpatentable; note Record, page 84, where the trial court, in discussing the Oakes invention, said: "His invention solved the problem of the glass industry. It is new to the art and decidedly useful and, therefore, patentable. Claims 4 and 5 are allowed."

The gist of the rejection by the trial court is a holding that patents such as Ostromislensky (R. 179), Klatte, et al. (R. 158), Collins (R. 197), etc., showing vinyl resins *per se* but making no reference to their use in sandpaper, could be validly combined with patents such as Carlton (R. 189), Klein, et al. (R. 177), etc., showing sandpaper but making no reference to the use of vinyl resins therein. Petitioner pointed out to the District Court that this holding was without precedent and was, furthermore, repugnant to the validity of the claims of Robie patent No. 2,111,006 (R. 95), which issued on an application based upon an original filing date of October 4, 1934, which is long subsequent to the original filing dates of both Oakes and Bartling; also that such holding was repugnant to the validity of the claims of Hepp patent No. 1,932,104 (R. 67), which issued on an original application filed January 15, 1932 i. e. subsequent to both Oakes and Bartling. Both Robie and Hepp claim abrasive articles, including sandpaper, in which particular vinyl resins and classes of vinyl resins are employed as a bond or binder adhesive. The United States Court of Appeals, D. C., by a majority of the three justices who heard the case, rendered a decision dated December 30, 1940 (R. 307), affirming the said judgments of the lower court, *Justice Stephens dissenting on the merits* (R. 310 and 333).

Thus the claims in issue define subject matter (abrasive articles) which is new over all the prior art and is decidedly

useful, and furthermore possesses a number of special advantages because of such novel construction (R. 307 and 308); in compliance with Revised Statutes, section 4886 as amended by the Act of May 23, 1930 (Appendix p. 26). Furthermore generally similar claims, directed to vinyl resin bonded abrasives including sandpaper and of indistinguishable scope (R. 310 and R. 98, 303-B and 68) have been allowed to other applicants on later applications: the claims in issue are *a fortiori* patentable on the same basis on which the Robie, Paulson and Hepp patents (R. 95, 303-A and 67) were granted. Interferences are now pending in the Patent Office between two Oakes applications, each based upon Serial No. 558,872 aforesaid, and claims 1 to 10 of said Robie patent (R. 98) and claims 1 and 2 of said Paulson patent (R. 303-B), respectively. That part of the decision of the trial court which has been affirmed by the Court of Appeals (R. 307), by a divided court, is repugnant to the validity of the claims which form the counts of said presently pending *Oakes* v. *Paulson* (R. 298-99 and 303) and *Oakes* v. *Robie Interference* (R. 98 and 322 (end)). Both of said Interferences are now awaiting decision by the Patent Office on the question of priority, no decision having thus far been rendered, though arguments at final hearing were heard on April 16 and 17, 1941. Both Interferences, their substance and status and their relation to the claims here in issue, were fully discussed in petitioner's brief to the Court of Appeals, and the fact that certain counts thereof (taken from the Robie and Paulson patents) dominated and are of a scope indistinguishable from claims here in issue was particularly stressed. These facts are generally recognized by the Court of Appeals in its opinion (R. 310).

The *Oakes* v. *Paulson Interference* was declared by the Patent Office on April 12, 1940 (R. 302), i. e. after judgment

by the trial court and appeal to the Court of Appeals. This fact was called to the attention of the Court of Appeals on May 3, 1940 (long before hearing) in a Petition for Leave to Apply to the District Court for Rehearing (R. 296). Count 1 of said Interference is similar and even broader in scope than many of the claims here in issue (R. 299-300). The *Oakes* v. *Robie Interference* was pending at the time of trial before the District Court, and is still pending.

Questions Presented.

The grant of the relief prayed for by petitioner is dependent solely upon answering in the affirmative the following closely related questions of law:

1. Where, in a suit to obtain a patent under section 4915 R. S., the Court of Appeals definitely recognizes that the subject matter claimed in a patent application is clearly new and decidedly useful, and possesses a number of important practical advantages because of such novel construction, and the District Court did not make findings of fact to the contrary, and further where the Court of Appeals recognizes that reasonable doubts exist on the question of whether such subject matter involves patentable invention over the prior art, and the District Court made no definite adverse finding of fact on invention, should not the Court of Appeals under such circumstances resolve *reasonable doubts* in favor of patentable invention, the existence of said doubts being recognized by the majority of the Court of Appeals and emphatically confirmed by the dissent on the merits by one of the Justices thereof?

2. More specifically, under such circumstances, and further when claims of similar and indistinguishable scope have been held patentable by the Patent Office and issued in one or more patents on the later filed application or

applications of one or more others, should not the Court of Appeals hold that this sufficiently indicates the inventive character of such subject matter as to merit issuance of letters patent thereon so as to avoid casting a cloud on the validity of said claims of said patent or patents in a proceeding in which neither the patentee nor his assignee is a party?

3. Where it is definitely recognized by the Court of Appeals that subject matter of claims in a patent application is novel and useful, and that, as shown by unquestioned and uncontradicted evidence, it possesses a number of special advantages because of such novel construction, and further where a decision is rendered by the Patent Office subsequent to judgment by the District Court again holding patentable claims of a patent and setting up an Interference (which is still pending and undecided) between the patent containing said claims and another application which is based on the aforesaid application, the claims forming the counts of said Interference being of scope similar to and indistinguishable from the aforesaid claims of said application, here in issue, should not the Court of Appeals in a suit under section 4915 R.S., to obtain a patent, take full judicial notice of such supervening circumstances and resolve reasonable doubts in favor of "patentable invention" so as to avoid a decision in conflict with the present view of the Patent Office on the patentability of the claims forming the counts of said Interference; or, in the alternative, should not the Court of Appeals recognize that such circumstances raise a real doubt against the validity of the District Court's judgment, and, therefore, accordingly grant Petitioner's (Appellant's) petition for leave to apply to the District Court for leave to file a bill of review?

Reasons Relied Upon for the Granting of the Writs of Certiorari.

The discretionary power of this Court is invoked (under section 240 (a) of the Judicial Code, 28 U. S. C. 347, as amended by the Act of February 13, 1925) upon the following grounds:

1. The construction and practical working of an important United States Statute in respect to Appellate review of the trial court's decisions, depends upon answering in the affirmative the questions of law raised.

The United States Court of Appeals for the District of Columbia has announced a novel principle of appellate practice involving the construction and practical working of a statute of the United States (Revised Statutes, section 4915, 35 U. S. C. 63, as amended by the acts of March 2, 1927 and of March 2, 1929, respectively—Appendix p. 26). Namely, that court has answered in the negative each of the three questions set out above. If such principle of practice were allowed to continue, the scope of appellate review in suits of this nature would be narrowed to the point of virtual impotency; in effect, the right of appellate review under section 4915 R. S. would be abrogated and the trial court would be allowed a very wide discretion in deciding that new and useful improvements in the arts do or do not involve "invention", even though its findings thereon were inconsistent with established rules of law, unless its findings were so manifestly erroneous and arbitrary as virtually to "require" reversal by the Court of Appeals (R. 310).

2. No court, prior to the Court of Appeals, D. C., in this case, ever held in a suit under Section 4915 R. S. to obtain a patent (or in any proceeding) that reason-

able doubts on the question of "invention", as to novel and decidedly useful subject matter, were not to be resolved in favor of him who seeks a patent.

The essentials of patentability are often said to be: (1) novelty; (2) utility; and (3) invention. It is possible unquestionably to establish "novelty" and "utility" by evidence. Because of the nature of the question of "invention", however, it is not possible unquestionably to establish the existence of "invention"; see authorities (R. 314 and 315). The question of invention is "a question of fact, to be determined, however, by rules of law" (R. 314) and, as such, it is somewhat analogous to, though much more difficult than, such questions as "due care" or "due diligence" under a given statute. By way of comparison, if a jury in a criminal trial had found an accused to be guilty of second degree murder and the trial judge had passed sentence accordingly, who should question the proposition that the reviewing court may determine on appeal whether the doctrine was correctly applied that reasonable doubts are to be resolved in favor of innocence of the accused and, if not correctly applied, reverse the lower court. If real doubts on the question of "invention" are not to be resolved by the Court of Appeals in a case of this character in favor of one who seeks a patent, after novelty, utility and a number of special advantages have been definitely proven, it is difficult if not impossible to conceive of a situation where an appellant could prevail in a case of this character, even though the ruling of the District Court on the question of "patentable invention" was very unharmonious with established rules of law and settled indicia of invention. In other words, if such a rule is established, the Court of Appeals, D. C., will in effect have resigned and renounced its powers and duties of appellate review under section 4915 R. S., insofar as rulings

on the question of "patentable invention" by the trial court is concerned, except where the trial court's finding on that question is so manifestly erroneous as to virtually "require" reversal by the Court of Appeals.

3. The United States Court of Appeals for the District of Columbia is itself divided on the proper answer to the legal questions herein presented, Justice Stephens dissenting on the merits from the other two Justices.

This fact may be noted by referring to the record (R. 310 and 333). Never prior to the institution of the present appeals before the Court of Appeals, D. C. was a decision rendered adverse to the appellant in a suit of this kind, to obtain a patent, when one of the Justices considered the appellant entitled to a patent on the merits. In other words, there is no reported decision prior to the institution of the present appeals in which a decision adverse to the appellant was rendered on the question of "invention" by a divided court. (However, subsequent to the institution of these appeals, in *Forward Oil Co.* v. *Coe,* 116 F. (2d) 946 (decided December 9, 1940), the Court of Appeals, with one justice dissenting, rendered a decision adverse to appellant on the merits, but there the question of "resolving reasonable doubts" was not discussed and apparently was not involved.)

Since the Court of Appeals decision in the instant causes, that Court has rendered another decision in a suit under section 4915 R. S., in which they cite their decision in the present cases as authority, on the novel point that doubts are not to be resolved in favor of "invention"; see *General Motors Corporation* v. *Coe,* 50 U. S. P. Q. 10; (decided June 16, 1941), as to which a Petition for Rehearing is now pending.

4. The decision of the majority of the Court of Appeals (two justices) on the question of resolving doubts in favor of patentable invention is in conflict with the uniform rulings by the same Court in earlier decisions, and also is in conflict with uniform rulings in other jurisdictions.

The Court of Appeals, D. C., repeatedly held, in the case of appeals directly from the Patent Office to that court, that doubts are to be resolved in favor of the inventor; see, for example, *In re Zenk,* 267 Fed. 327, 330; 50 App. D. C. 25 (1920); and *In re Coykendall,* 29 F. (2d) 868, 870; 58 App. D. C. 280 (1928). Since the determinations or findings of fact of the Patent Office, as well as those of a Federal District Court, are entitled to a presumption of correctness (*Morgan* v. *Daniels,* 153 U. S. 120, 14 S. Ct. 772, 38 L. Ed. 657), no logical reason exists why a rule should be applied in respect to appeals from the District Court under section 4915 R. S. different from that in direct appeals from the Patent Office. Additionally the Court of Appeals, D. C. has previously followed this rule in appeals from the District Court under section 4915 R. S.; see *Battery Patents Corp.* v. *Coe,* 93 F. (2d) 220, at end of 226 and top of 227 (1937). This rule is also inherent in the decision of the Court of Appeals, D. C., in *Gyro Process Co.* v. *Coe,* 107 F. (2d) 195, at 200 (1939).

The Court of Customs and Patent Appeals has also repeatedly held that reasonable doubts will be resolved in favor of "invention" or patentability; see *In re Kirby,* 109 F. (2d) 786, at 788 (1940).

A similar rule has been recognized in the Fourth Circuit when suits under section 4915 R. S. were tried there: see *Berry* v. *Robertson, Comm. of Patents,* 40 F. (2d) 915, at 921 (1930); and *Cooper* v. *Robertson,* 46 F. (2d) 766, at 769 (1931).

5. This Court has never squarely passed upon the question of resolving doubts in favor of "invention" or "patentability", though some of this Court's decisions have been judicially characterized as "in point" on the familiar rule that, where doubt exists as to "invention", it should be resolved in favor of the inventor.

The United States Court of Customs and Patent Appeals in *In re Amand*, 63 F. (2d) 117, at 119 (1933) stated:

> "Upon the whole record, we are of opinion that this presents one of those cases in which there is a doubt which should be resolved in appellant's favor. The rule is a familiar one and requires no elaborate citation of authorities, of which appellant has listed a large number. The familiar case of Eibel Process Co. *v.* Minnesota & Ontario Paper Co., 261 U. S. 45, 43 S. Ct. 322, 67 L. Ed. 523, seems in point, as does the case of Richmond Screw Anchor Co. *v.* United States, 275 U. S. 331, 48 S. Ct. 194, 72 L. Ed. 303. Another is that of In re Kirschbraun, 44 F. (2d) 675, 18 C. C. P. A. 735."

Upwards of fifty other decisions could be cited which repeat the familiar rule that reasonable doubts on the question of invention are to be resolved in favor of him who seeks a patent; see *In re Stevenson*, 10 F. (2d) 1008, at 1009, 56 App. D. C. 143 (1926); and *In re Pupin*, 299 Fed. 697, at 701, 55 App. D. C. 14 (1924). No authority can be found in opposition to this rule. Moreover appellee-respondent admitted that this is the general rule on page 4 of his memorandum dated January 22, 1941, in opposition to Appellant's Petition for Rehearing, where he stated:

> "The resolving of doubt in favor of an applicant for patent is the rule followed by the Primary Examiner and Board of Appeals of the Patent Office, and probably also by the District Court according to Berry *v.* Robertson, 40 F. (2d) 915, cited by Appellant. * * * It is not seen that this 'tender consideration' accorded

to applicants should be continued further in a Court of Appeals * * *."

It is noteworthy that the words "tender consideration" are from the decision of the Circuit Court of Appeals, 4th Circuit, in *Cooper* v. *Robertson*, 46 F. (2d) 766, at 769 (1931) where in a suit under section 4915 R. S. to obtain a patent that court referred to—

> "that *tender consideration* which should be given *always* to inventive genius" (emphasis added).

Thus the views of the appellee-respondent are opposed to those of the Fourth Circuit, in this latter respect.

6. In suits generally which involve the question of patentable invention of claims, appellate courts have commonly followed the principle that they have the right fully to investigate whether the trial court's determination on the question of patentable invention is or is not consistent with rules of law.

Illustrative of the great mass of cases illustrating this point is *Textile Machine Works* v. *Louis Hirsch Textile Machines, Inc.*, 302 U. S. 490, 58 S. Ct. 291, 82 L. Ed. 382 (1938) and *Kurtz* v. *Belle Hat Lining Co., Inc.*, 280 Fed. 277 (C. C. A. 2d, 1922). It would be a startling new principle of appellate practice in infringement suits, as well as in suits under section 4915 R. S., if appellate courts were not permitted independently to investigate and determine whether they, in their judgment, believed the trial court correctly applied rules of law in determining whether the claims in issue involve patentable invention, and to pass judgment in accordance with such determination.

7. The ruling of the Court of Appeals in the instant cases to the effect that the inconsistent granting of patents on applications of others does not show that the Patent Office should have held the claims in issue to be

> patentable, even where novelty, utility and a number of advantages of the subject matter of the claims in issue have been judicially recognized by the Court of Appeals, has recently been recognized by said Court of Appeals (including different judges) to be an open question of law.

The Court of Appeals in its majority opinion in the instant causes (R. 310), in referring to the issuance by the Patent Office of the Robie, Paulson and Hepp patents (R. 95, 303-A and 67) stated:

> "The inconsistent granting of other applications no more proves the Office wrong in rejecting the present claims than inconsistent rejection of other applications would prove it wrong in granting claims."

This is a surprising statement. Also it is in conflict with the well established principle that issued patents are presumed to be valid.

Furthermore the Court of Appeals, D. C. in *Minnesota Mining and Manufacturing Company* v. *Coe,* Appeal No. 7533 (which is an appeal entirely separate from the present causes) entered Order dated July 2, 1941, reading as follows:

> "It is Ordered by the Court that the above entitled appeal be, and it is hereby, set down for rehearing with No. 7400, *Sharp* v. *Coe,* and No. 7374, *Dyer* v. *Coe,* during the October Term, 1941, on the question whether allowed claims can be used as a measure of the patentability of rejected claims."

The issuance of this Order by the Court of Appeals indicates that the refusal of the majority of the Court in the instant causes to recognize the claims of the Robie, Paulson and Hepp patents as a measure of the patentability of the claims in issue, was based upon a novel and *unsettled* state-

ment of law, which furthermore is opposed to the familiar rule that doubts are to be resolved in favor of an applicant for a patent.

8. The majority ruling of the Court of Appeals, D. C., is confusing two established and consistent principles of law.

It is established by very many decisions (and there are no authorities to the contrary) that reasonable doubts should be resolved in favor of patentable invention, as above pointed out. It is also clearly established by many decisions that, in Federal appellate procedure Courts of Appeals will not disturb the trial court's findings as to *facts* unless convinced of their error. These principles are not in conflict. The initial presumption by the Court of Appeals that the trial court was correct in holding against patentable invention is, of course, sound; but this *initial* presumption was overcome when the Court of Appeals concluded that "reasonable doubt" existed (R. 309) and that the record was "persuasive that a reasonable mind might find invention here" (R. 310); also when the Court of Appeals specifically found novelty, utility and a number of special advantages to exist whereas the trial court failed to make such findings even after a motion for additional findings was presented.

For all that is shown on the record, the trial court may have failed, and evidently did fail to apply the doctrine of resolving reasonable doubts in favor of invention, which appellee-respondent admits is "probably" applicable to "the District Court according to *Berry* v. *Robertson,* 40 F. (2d) 915"; see *supra.* Erroneous applications or the non-application of rules of law by a trial court should be reviewed and corrected on appeal. The trial court could not have been free of doubt on the question of invention in the instant causes; to conclude that it was free of doubt would

be repugnant to the validity of the claims of the Robie patent; also the Paulson and Hepp patents.

Thus there is no conflict between the two principles aforesaid and, contrary to the ruling of the majority of the Court of Appeals, a finding of no invention by the trial court (which was only made by implication) in no way prevents or excuses the Court of Appeals from fully determining whether the trial court correctly applied the settled doctrine that reasonable doubts are to be resolved by the trial court in favor of "patentability" or "invention". Criteria or standards of "invention", like criteria or standards of "valuation", are subject to full review on appeal; see *Powers* v. *Commissioner of Internal Revenue*, 312 U. S. 259, 61 S. Ct. 509, 85 L. Ed. 435 (1941).

9. Where new matter arises subsequent to judgment by the trial court which raises a doubt as to the correctness of the trial court's judgment, leave to petition the trial court for a bill of review should be granted by federal appellate courts as a matter of course.

This point applies particularly to question 3.

The declaration by the Patent Office of the Oakes v. Paulson Interference on April 12, 1940 (R. 302) constitutes pertinent new matter. The denial by the Court of Appeals (R. 334) of appellant's Petition for leave to apply to the District Court for a bill of review is opposed to the rule that "whenever the right to file a bill is at all doubtful, leave is granted as a matter of course": *Egry Register Co.* v. *Standard Register Co.*, 1 F. (2d) 11, at 12 (C. C. A., 6th, 1924). The same rule is stated and followed in *Raffold Process Corp* v. *Castanea Paper Co.*, 105 F. (2d) 126, at 129 (C. C. A., 3rd Cir. 1939) and in *Pittsburgh Forgings Co. et al.* v. *The American Foundry Equipment Co.* (decided March 31, 1941—C. C. A., 3rd Cir.) 49 U. S. P. Q.

153, 154. Also that "leave to file a supplemental petition in the nature of a bill of review may be granted after the judgment of the appellate court" is shown by this Court's decision in *National Brake and Electric Co.* v. *Christensen,* 254 U. S. 425, 431, 41 S. Ct. 154, 65 L. Ed. 341, at 343. This Court also has held that "Intervening and conflicting decisions will thus cause the reversal of judgments" even where such judgments "were correct when entered": *Vandenbark* v. *Owen-Illinois Glass Co.,* 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 317, at 320 (1941). It is incongruous with such decisions for the Court of Appeals to ignore the declaration and pendency of the Oakes v. Paulson Interference, count 1 of which is of scope similar to and indistinguishable from claims here in issue.

10. Pertinent new circumstances or new matter, arising subsequent to judgment by the trial court, is entitled to full judicial notice by the Court of Appeals.

This Court stated in *Patterson* v. *Alabama,* 294 U. S. 600, 607; 55 S. Ct. 575; 79 L. Ed. 1082, 1086 (1935) that—"in determining what justice does require, the court is *bound* to consider any change, either in fact or in law, which has supervened since the judgment was entered". This rule has also been equally applied in civil, as well as in criminal cases: *State Tax Comm.* v. *Van Cott,* 306 U. S. 511, at 515; 59 S. Ct. 605; 83 L. Ed. 950, at 953 (1939) and *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 555; 84 L. Ed. 920, at 923; 60 Sup. Ct. 676, 679.

The Court of Appeals in the instant causes has acted contrary to this rule in ignoring, and rendering a decision inconsistent with the validity of the counts of the presently pending Oakes v. Paulson Interference, declared April 12, 1940, i. e. after judgment by the trial court.

11. Since the Commissioner of Patents now uniformly refuses, and for some time past has uniformly refused to accept service outside the District of Columbia in suits under section 4915 R. S., it is impossible in the future to secure rulings of other Federal Circuits on the questions of law here presented, as applied to appellate review under said section 4915 R. S.

The fact that there has been a dissent on the merits, where important points of law involving the constructive practical working of a statute are involved, should therefore be regarded as tantamount to a conflict of ruling between different Circuits in other cases. Under the latter circumstance Certiorari is frequently granted, and it is highly desirable that it likewise be granted here to avoid conflicting decisions between different judges of the Court of Appeals, D. C. Though the dissenting judge has written no dissenting opinion in the instant causes, his views are stated in cases where he has written the majority opinion; see *Battery Patents Corp.* v. *Coe,* 93 F. (2d) 220, at 226 (1937); and *Poulsen* v. *Coe,* 119 F. (2d) 188 at middle of column 2 on page 199 (1941).

WHEREFORE, your petitioner respectfully prays that three Writs of Certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, commanding the said court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings in the Court of Appeals had in these causes, to the end that the same may be reviewed and determined by this Court; that the judgments of the said Court of Appeals be reversed and that petitioner be granted such other and further relief as may be deemed proper.

MINNESOTA MINING & MANUFACTURING COMPANY, *Petitioner,*

By PAUL CARPENTER,
HAROLD J. KINNEY,

July 9, 1941. *Attorneys for Petitioner.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 257, 258, 259

MINNESOTA MINING & MANUFACTURING COMPANY,

Petitioner,

against

CONWAY P. COE, COMMISSIONER OF PATENTS,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Court of Appeals for the District of Columbia is reported at 118 F. (2d) 593, and appears in the record filed herewith (R. 307 to 310).

Two opinions were entered by the trial court, one covering the two Oakes cases (R. 79-85) and the other covering the Bartling case (R. 278-80). The trial court also prepared joint Findings of Fact and Conclusions of Law in the two Oakes cases (R. 85-90), and separate Findings in the Bartling case (R. 280-81).

Jurisdiction.

The grounds on which the jurisdiction of this Court is invoked have been set forth in the Petition.

Attention, however, is called to two other cases where this Court took jurisdiction in suits against the Commissioner of Patents under Revised Statutes, § 4915:

Butterworth, Commissioner of Patents, v. *Hill, et al.,* 114 U. S. 128;

Gandy v. *Marble, Commissioner of Patents,* 112 U. S. 432.

Statement of the Case.

The facts are sufficiently stated in the Petition.

Specification of Errors.

The errors which Petitioner will urge, if the Writs of Certiorari are issued, are that the Court of Appeals failed to answer the questions set out in the Petition hereof in the affirmative and rendered judgments contrary to an affirmative answer to said questions, or any of them.

Summary of Argument.

The summary of argument and also the arguments themselves, relied upon for the issuance of the Writs of Certiorari, are primarily set forth in the foregoing Petition (*supra,* pp. 8-18). Only brief additional arguments follow.

Argument.

It is, of course, well settled that every novel and useful thing does not necessarily involve patentable invention. But it is equally well settled, as pointed out in the Petition, *supra,* that where an article of manufacture defined in an application for letters patent is new and useful, and doubt exists as to its "inventiveness" or "patentability", such

doubt should be resolved in favor of issuing the patent. Doubts are raised by facts or circumstances, established by the record, showing that the new and useful thing measures up to standards of invention which have been enunciated and followed by authoritative tribunals. Advantages and improvements due to the novel construction are among the most important indicia of invention. Also, rulings in parallel cases, as the holding of patentability as to the claims of Robie, Paulson and Hepp by issuance of patents to them, is another and important standard of invention because it shows what the Patent Office, as the expert administrative agency, regarded as indicating attainment sufficient to involve patentable invention.

If reasonable doubts were not to be resolved in favor of an appellant in an appeal of this kind, then the appeal could not be efficacious no matter how well appellant's evidence showed that his novel and useful article measured up to the established standards of invention; because, how could the Court of Appeals ever decide that the issues should be decided in appellant's favor as a matter free of doubt when the trial court had held against plaintiff? For the Court of Appeals to so decide would be for that court to conclude that the trial judge lacked rationality and was wrong beyond doubt in deciding that "invention" was lacking. But how could any appellate court reach such a conclusion where the question which the trial court decided was the difficult question of "invention", the proper determination of which is dependent on the proper application of complex rules of law?

As stated in the petition, the above indicia of invention, in addition to novelty and utility, have been clearly demonstrated (R. 307-310). The fact that doubts exist on the question of patentable invention is recognized by the majority of the Court of Appeals (two judges) and is confirmed and emphasized by the dissent on the merits by one judge.

When a patent issues, whether it issues as the result of a suit under section 4915 R. S., or otherwise, it, of course, is only presumed *prima facie* to be valid and to involve patentable invention; it is not conclusively presumed to be valid. The basic, underlying reason for resolving reasonable doubts in favor of invention in applications for patents, including suits under section 4915 and appeals of all types, is so that a patent may expeditiously issue, leaving doubtful questions of validity or "patentable invention" (where they exist) to be determined subsequently in an *inter partes* suit. To deny a patent in such cases would be to deprive the inventor of the opportunity ever to have a full determination of his rights in an ordinary infringement suit.

The majority of the Court of Appeals is here confusing principles of law. If the rule of *resolving reasonable doubts* in favor of the applicant applies to the District Court in a suit of this nature (and this principle is admitted by appellee-respondent and shown by various decisions, with no decision to the contrary), then the Court of Appeals must consider this rule and determine whether the same has been correctly applied by the District Court. The Court of Appeals must determine and decide whether the proper rules, standards and presumptions of the law have been correctly applied; otherwise violations of or departures from settled principles of law by the trial court will neither be detected nor corrected by the Court of Appeals, D. C.

Thus the reasonable doubt rule is one which the Court of Appeals must consider and apply in cases of this character, in order fully to review whether the District Court followed the law. For the Court of Appeals to say that the rule of resolving reasonable doubts in favor of the applicant does not apply in "appeals from the District Court" (R. 309) in suits under section 4915 R. S. to obtain a patent, is as anomalous and as opposed to established rules of

law and settled principles of appellate review as it would be for an appellate court to hold that the doctrine of presumed innocence in criminal cases does not apply in "appeals from the trial court". That the latter ruling would be unsound needs no citation of authority; but, on this point, see this Court's decision in *Patterson* v. *Alabama*, *supra*.

Also such a principle in regard to appellate review is opposed to the ruling of the First Circuit, as affirmed by this Court in *Powers* v. *Commissioner of Internal Revenue* 312 U. S. 259; 61 Sup. Ct. 509; 85 L. Ed. 435 (1941). There the First Circuit reversed the U. S. Board of Tax Appeals on the ground that it had applied a wrong standard in determining the "value" of certain insurance policies. "Value" is of course a question of fact. In affirming the First Circuit this Court stated (85 L. Ed. 435, 436):

> "That judgment must be affirmed * * *, unless as claimed by petitioner the court below was precluded from substituting its judgment *of value* for that of the Board. * * * But the question of what *criterion* should be employed for determining the 'value' of the gifts is a question of law. See Lucas *v.* Alexander, 279 U. S. 573, 73 L. Ed. 851, * * * Accordingly, the Circuit Court of Appeals was justified in reversing the decision of the Board as 'not in accordance with law'." (Emphasis added.)

Similarly, this Court should take jurisdiction and, applying the above doctrine to appellate review under section 4915 R. S., and following the view of the dissenting justice in the instant causes, put at rest the analogous proposition that "what criterion should be employed in determining" *invention* in a novel and decidedly useful article "is a question of law".

The nature of the question of "invention" has been investigated and discussed by this Court. In *McClain* v. *Ort-*

mayer, 141 U. S. 419, 427, 35 L. Ed. 800, at 803 (1891) this Court stated:

> "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not * * * Courts, *adopting fixed principles as a guide*, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; * * *" (Emphasis added.)

The nature of the question of "invention" has more recently been discussed in *Cleveland Trust Co.* v. *Schriber-Schroth Co.*, 92 F. (2d) 330, at 334 (1937) where the Circuit Court of Appeals, 6th Cir., stated:

> "Probably the most difficult task that confronts a patent court lies in determining whether there is invention", etc.

Note that it is an appellate court which is here concerned with the question of "invention".

Conclusions.

It is a novel and anomalous departure in our law, fraught with much confusion and mischief, for the Court of Appeals, D. C., to affirm the trial court without determining and deciding whether the trial court has correctly applied established standards and presumptions of the law in arriving at its implied conclusion of "no invention", thereby casting a cloud on the validity of claims of issued patents, and claims forming counts of Interferences presently pending in the Patent Office, in a suit in which none of the patentees or their assignees is a party. (Actually the trial court made no express finding of fact that "invention" is lacking, or, as it is sometimes stated, that the requisite "unobviousness" is lacking, or any equivalent express finding of fact.)

For the reasons herein stated it is believed that this Court should be moved to grant Writs of Certiorari, (for reasons generally comparable to those that moved it to do so in *Powers* v. *Commissioner of Internal Revenue, supra,* even where, as distinguished from the present causes, there was no dissent in the First Circuit), to the end that the scope of appellate review under section 4915 R. S. will be clarified and settled and the fundamental questions of patent law hereinabove presented may be settled by this Court and the judgments of the court below reversed.

Respectfully submitted,

PAUL CARPENTER,
HAROLD J. KINNEY,
Attorneys for Petitioner.

July 9, 1941.

APPENDIX.

Statutes Cited.

Revised Statutes, Section 4886; 35 U. S. C. 31 (as amended by the Act of May 23, 1930).

Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.

Revised Statutes, Section 4915; 35 U. S. C. 63 (as amended by the Acts of March 2, 1927 and March 2, 1929).

Whenever a patent on application is refused by the Commissioner of Patents, the applicant, unless appeal has been taken from the decision of the board of appeals to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six months after such refusal; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant's filing in the Patent Office a copy of the adjudication, and otherwise complying with the re-

quirements of law. In all cases where there is no opposing party, a copy of the bill shall be served on the commissioner; and all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not. In all suits brought hereunder where there are adverse parties the record in the Patent Office shall be admitted in whole or in part, on motion of either party, subject to such terms and conditions as to costs, expenses, and the further cross-examination of the witnesses as the court may impose, without prejudice, however, to the right of the parties to take further testimony. The testimony and exhibits, or parts thereof, of the record in the Patent Office when admitted shall have the same force and effect as if originally taken and produced in the suit.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 257, 258, 259

MINNESOTA MINING & MANUFACTURING COMPANY, PETITIONER

v.

CONWAY P. COE, COMMISSIONER OF PATENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the United States District Court for the District of Columbia (R. 79–85; 278–280) are not reported. The opinion of the Court of Appeals (R. 307–310) and its opinion on rehearing (R. 332–333) are reported in 118 F. (2d) 593.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was en-

Office a copy of the adjudication and otherwise complying with the requirements of law. In all cases where there is no opposing party a copy of the bill shall be served on the commissioner; and all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not. In all suits brought hereunder where there are adverse parties the record in the Patent Office shall be admitted in whole or in part, on motion of either party, subject to such terms and conditions as to costs, expenses, and the further cross-examination of the witnesses as the court may impose, without prejudice, however, to the right of the parties to take further testimony. The testimony and exhibits, or parts thereof, of the record in the Patent Office when admitted shall have the same force and effect as if originally taken and produced in the suit.

STATEMENT

Petitioner is the assignee of two patent applications of Byron J. Oakes, Serial Nos. 228,188 and 558,872, and one of Howard G. Bartling, Serial No. 692,436 (R. 85, 280). The claims of these applications are for abrasive sheets or belts comprised of a backing and an abrasive grit bonded to it. The gist of the claims is that they disclose vinyl resins as a binder (R. 85–86, 280). The applications in question were rejected by the Patent Office on the ground that invention was lacking because the use

of vinyl resins in making abrasives was taught by combining prior art (R. 63, 210, 276). The Patent Office, however, granted subsequent claims of other persons which were substantially identical to the claims rejected in the instant case (R. 67, 95). Petitioner thereupon filed suit in each of the applications in the United States District Court for the District of Columbia, seeking, under the provisions of section 4915 of the Revised Statutes, a declaration that it was entitled to the issuance of a patent.

The use of varnishes as bonds and the use of celluloid varnishes or lacquers as bond agents for sandpaper was well established before the filing of the petitioner's applications (R. 83, 280–281). The prior art also disclosed the use of vinyl resins in the varnish field and the feasibility of substituting such resins for celluloids as binders (R. 83, 280–281). In addition, the Benner patent No. 1,825,771 disclosed an abrasive article in which the abrasive particles are held together by a bond formed of organic materials, one of which the trial court found was a vinyl compound (R. 281).

The district court held that, in the light of the prior art the use of vinyl resins for binders was an obvious development in the art and found that, as to all but two of the claims involved,[2] no inven-

[2] The district court held claims 4 and 5 of Oakes' application Serial No. 228,188, disclosed invention inasmuch as they solved a problem of the glass industry in providing a wet abrasive belt (R. 84, 89).

tion was disclosed [3] (R. 83, 89, 280–281). It entered judgment accordingly (R. 90, 282). Petitioner appealed to the Court of Appeals for the District of Columbia.

While the appeals were pending, petitioner filed a motion with the court of appeals asking leave to apply to the district court for a rehearing and for consideration of newly discovered evidence (R. 296). The ground for the motion was the declaration by the Patent Office of an interference between claims of a subsequent application of Oakes which petitioner contends were substantially identical with those here involved and the claims of a patent issued to Paulsen on March 25, 1938 (R. 300–301). The motion was denied (R. 305–306). The Court of Appeals for the District of Columbia thereafter affirmed the judgments of the district court (R. 310–311). A motion for rehearing was denied on February 12, 1941 (R. 332–333). A motion for

[3] The district court's finding of no invention was included in its conclusions of law in one case, and in its memorandum opinion in the other two cases. In none did it include the finding of no invention in its findings of fact. The court below treated the finding as one of fact. The district court's failure to include the finding in its findings of fact was first adverted to by petitioner in its motion for rehearing by the court below. The court held, however, that such failure was harmless error and one which in any event was waived by petitioner in the appeal, because it made no mention of the matter in the statement of points upon which it intended to rely nor in its brief and oral argument (R. 332–333). Petitioner does not now seek review of the disposition of this point by the court below.

leave to file a bill of review in the district court was denied on April 29, 1941 (R. 334–335).

ARGUMENT

The court below held that the District Court's finding of no invention could not be disturbed if supported by substantial evidence. It further held that there was substantial evidence to support such finding and that issuance of patents by the Patent Office in similar claims did not require a contrary conclusion. The decision below is correct and presents no question requiring review by this court.

1. The question of invention is one of fact. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205. The scope of appellate review in an action brought under the provisions of R. S. 4915, in so far as it relates to a question of fact, was accurately stated by the court below to be limited to the question of whether the finding that there was no invention was consistent with the evidence or was supported by the evidence[4] (R. 309). A proceeding under R. S. 4915 is an equity action, and follows the ordinary course of equity practice and procedure. *Butterworth* v. *Hoe,* 112 U. S. 50, 61. It is well established that the findings of fact of the trial court in an equity case will not be disturbed unless clearly erroneous or without support in the evidence. *Warren* v. *Keep,* 155 U. S. 265; *Furrer* v. *Ferris,*

[4] Petitioner does not deny that there was substantial evidence to support a finding of no invention.

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[4] Petitioner does not deny that there was substantial evidence to support a finding of no invention.

145 U. S. 132; *Tilghman* v. *Proctor,* 125 U. S. 136, 149; *Borden's Farm Products Co., Inc.,* v. *Ten Eyck,* 297 U. S. 251, 261; *Great Atlantic & Pac. Tea Co.* v. *Grosjean,* 301 U. S. 412, 420. The doctrine is applicable in principle to proceedings under R. S. 4915 and has been so applied by the court below in previous cases. *Abbott* v. *Coe,* 109 F. (2d) 449, 451; *Eppensteiner* v. *Coe,* 114 F. (2d) 457; *Forward Process Co.* v. *Coe,* 116 F. (2d) 946, 947. Cf. *Walker,* Patents (Dellers ed.), sec. 629. It is of peculiar force where, as here, the contested finding has been concurred in by both the Commissioner of Patents and the district court. *Abbott* v. *Coe,* at p. 452; cf. *United States* v. *Commercial Credit Co., Inc.,* 286 U. S. 63, 67.

The cases cited by petitioner (Pet. 11–12) in support of a contrary rule are not in point. They all involved a direct appeal from the Patent Office either to the Court of Customs and Patent Appeal or the Court of Appeals of the District of Columbia prior to the transfer of jurisdiction of such appeals from the latter to the former court. Act of March 2, 1929, 45 Stat. 1475, 1476. In such cases, as this Court has held, the Court of Appeals was "made part of the machinery of the Patent Office for administrative purposes" and rendered "a mere administrative decision." *Postum Cereal Co.* v. *Calif. Fig Nut Co.,* 272 U. S. 693, 698–699. Such decisions plainly have no bearing on the scope

of appellate review of the findings of the trier of fact in judicial proceedings.[5]

2. Petitioner also urges that the action of the Patent Office in granting patents on applications filed subsequent to the filing of the instant applications and containing claims substantially identical with those rejected in the instant case is of itself sufficient evidence that the claims in suit involved invention. Assuming, for purposes of argument, as did the court below, that the claims are substantially the same, the contention is yet without merit.[6] The sole question involved on review of the judgment of the district court was whether its finding was supported by substantial evidence. It is immaterial that there was evidence from which a contrary conclusion could have been, but was not required to be, drawn either by the Patent Office or the district court.[7]

CONCLUSION

The decision of the court below is correct and proceeds upon familiar and well-settled principles.

---

[5] The rule for which petitioner contends was mentioned in *Battery Patents Corp.* v. *Coe*, 93 F. (2d) 220, 226–227 (App. D. C.), involving an action under R. S. 4915, but the court found it unnecessary to determine whether it was controlling in such proceedings.

[6] Respondent's contention that the claims were distinguishable was not passed upon below.

[7] Petitioners do not contend that the substantiality of the evidence in the instant case is dissipated by the Patent Office's action in granting indistinguishable patents.

There exists no conflict. We respectfully submit that the petition for a writ of certiorari should, therefore, be denied.

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FRANCIS M. SHEA,
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MELVIN H. SIEGEL,
PAUL A. SWEENEY,
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OCTOBER TERM, 1941

Nos. 257, 258, 259

MINNESOTA MINING & MANUFACTURING COMPANY,

Petitioner,

vs.

CONWAY P. COE, COMMISSIONER OF PATENTS,

Respondent.

REPLY BRIEF OF PETITIONER.

PAUL CARPENTER,
HAROLD J. KINNEY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 257, 258, 259

MINNESOTA MINING & MANUFACTURING COMPANY,

Petitioner,

vs.

CONWAY P. COE, COMMISSIONER OF PATENTS,

Respondent.

REPLY BRIEF OF PETITIONER.

This is in reply to the brief for the respondent filed in August, 1941, in the above matter.

Introductory Remarks.

It is understood that a Petition for a Writ of Certiorari is about to be filed, or else has been filed, in *General Motors Corp.* v. *Coe*, 120 F. (2d) 736; 50 U.S.P.Q. 10 (Ct. App., D.C., June 16, 1941) on the same basic question here involved, *i. e.*, the reasonable doubt doctrine. The *General Motors* v. *Coe* decision has been cited and briefly discussed (Pet. 10). In that decision the United States Court of Appeals for the District of Columbia relied solely upon its earlier decision in the present case as authority in

respect to resolving doubts against the inventor on the question of "invention."

If the respective Writs of Certiorari are granted, as requested, it seems that this case and *General Motors* v. *Coe* might conveniently be heard on the same day and decided concurrently.

* * * * *

In the respondent's brief there are certain omissions and certain statements to which the petitioner believes it necessary, for the proper consideration of its petition, to call attention. Also it is desired to point out a decision of the court below, published since this petition was filed, which pertinently bears on one of the questions herein.

Questions Involved.

Three questions are presented in the petition which mainly involve:

(*a*) resolving reasonable doubt in determining invention;

(*b*) scope of appellate review; and

(*c*) the weight to be given allowed claims in measuring the patentability of similar or analogous rejected claims.

The reasonable doubt doctrine is most broadly involved in question 1 (page 6 of the Petition) and is somewhat more narrowly involved in questions 2 and 3; the weight to be given to allowed claims in measuring the patentability of analogous rejected claims is involved only in questions 2 and 3 (pages 6 and 7 of the Petition); while the scope of appellate review is, of course, involved in all three questions.

(a) The reasonable doubt doctrine.

In the majority opinion of the court below (R. 309; 118 F. (2d) 593, 594), it was stated that:

> "Whatever else may be said of older decisions that, in appeals from the Patent Office, doubt was to be resolved in favor of the applicant, they are obviously not law in relation to appeals from the District Court."

In the Petition the question concerning whether the above pronouncement is to become law is presented as the petitioner's first question. On page 11 of the Petition it is stated that the above pronouncement is opposed to upwards of fifty decisions and that *there is no precedent whatsoever in support of it*. This statement is not challenged by the respondent.

In the respondent's brief, however, this question is *omitted*. The respondent (page 2 of his brief) lists the questions that are presented in the Petition as being only two in number. He excludes the reasonable doubt question, which is the basic question. Furthermore, he omits all discussion of the reasonable doubt doctrine.

The doctrine of resolving reasonable or real doubts in favor of patent applicants has long existed, like many other principles of law, side by side in the body of the law with the entirely separate and distinct principle, *viz.*, the initial presumption of appellate courts that the *fact* findings of trial courts *and* administrative tribunals are correct; *cf.* last paragraph in *Abbott* v. *Coe*, 109 F. (2d) 449, at 452 (Ct. App., D.C., Nov. 1939), cited by respondent.

Respondent's assertion (page 8 of his brief) that the cases cited by Petitioner (Pet. 11) "all involved a direct appeal from the Patent Office" is erroneous, as discussed more in detail hereinbelow; but see, for example, *Battery*

Patents Corp. v. *Coe,* 93 F. (2d) 220, at 226-7 (Pet. 11), which is an appeal from the District Court in a R.S. 4915 action.

(b) Scope of appellate review.

In the present case (118 F. (2d) 593), and in its later decision in *General Motors Corp.* v. *Coe,* 120 F. (2d) 736, *supra,* the court below refuses to disturb a decision on appeal if there is a *rational basis* therefor; see *Abbott* v. *Coe,* 109 F. (2d) 449, at 451 and 452 (Ct. App., D.C., 1939), cited by the Court of Appeals in its decision in the instant case and also in *General Motors Corp.* v. *Coe,* where the expression "rational basis" was introduced in respect to suits of this character.

In *Radtke Patents Corp.* v. *Coe,* 50 U.S.P.Q. 316; ..... F. (2d) ..... (decided June 30, 1941), which is an action under R.S. 4915, there is ample evidence in the opinion of a "rational basis" for the decision of the District Court and the Patent Office in favor of patentable invention (and this is corroborated by the dissent on the merits of one of the judges of the Court of Appeals), and yet the Court of Appeals reversed the District Court and held that the claims there in issue did not involve patentable invention. The Court, by a majority, stated (50 U.S.P.Q. 316, at 332, Col. 2):

> "As previously indicated, this Court cannot be guided by the assumption upon which the parties seem to have relied. Instead, it is required to determine the question of invention from the record."

This is a striking contrast to what the majority of a differently constituted Court said in the opinion in the instant causes (*Minnesota etc.* v. *Coe,* 118 F. (2d) 593, at 594-5) in respect to its power and duty, as a reviewing court: namely,

that it should not itself determine whether "invention" is or is not present.

This further shows an inconsistent and unsettled policy within the Court of Appeals itself as to the scope of appellate review *generally*, and in respect to suits under Section 4915 R.S. *particularly*. Scope of review goes to the very root of an appellate tribunal's chief function.

(c) Weight to be given allowed claims in measuring the patentability of rejected claims.

It was pointed out in the Petition that there is no disagreement as to the essential facts. One important fact is clearly summarized in the following concise admission of respondent (page 5 of his brief):

> "The Patent Office, however, granted subsequent claims of other persons which were substantially identical to the claims rejected in the instant case (R. 67, 95)."

It is a most anomalous situation if, with novelty and utility admitted by respondent (R. 308, lines 4-5) and with it further admitted (Brief, p. 5) that claims "substantially identical" to those here in issue were granted to others with later applications (R. 310), patent protection should be denied to Oakes and Bartling, the *first inventors*.

It is accordingly submitted that due weight should be given to claims of the issued Robie, Paulson and Hepp patents (which are of course presumptively valid) in measuring the patentability of claims here in issue which are admittedly "substantially identical," as well as admittedly defining novel, useful and advantageous articles of manufacture (R. 308). That the weight to be given to allowed claims in measuring the patentability of rejected claims is a question of law, and one which is unsettled in the court

below, is clear (Pet. 14). Oral arguments on this point of law will probably be heard by Court of Appeals (in other cases) during October or November, 1941.

How different would have been the conclusion of the court below in the present case if it followed the principle laid down by different judges of the same court in *Radtke Patents Corp.* v. *Coe, supra,* namely, that in an appeal from the District Court under Section 4915 R.S., the Court of Appeals, D.C., "is required to determine the question of invention from the record." In the present case (118 F. (2d) 593, at 594), contrariwise, the Court said, "we are to decide not whether in our opinion there was invention," etc.

Inaccuracies in Respondent's Brief and Comments Regarding Same.

(1) *Re page 1 of his brief:*—The memorandum opinions of the U. S. District Court, D.C., are reported at 28 F. Supp. 430 and 433. Petitioner overlooked pointing this out in its Petition.

(2) *Re footnote on page 3 of his brief:*—The counts of the Oakes v. Paulson Interference No. 78,175 appear as claims 1 and 2 of the Paulson patent (R. 303 B), and the counts of the Oakes v. Robie Interference No. 76,371 appear as claims 1 to 10 of the Robie patent (R. 98).

(3) *Re end of page 4 and top of page 5 of his brief:*—The respondent asserts that applications here in issue were rejected by the Patent Office "because the use of vinyl resins in making abrasives was *taught* by combining prior art." No place did the Patent Office make any contention that such was "*taught.*" On the contrary *the Commissioner has expressly admitted novelty* (R. 308) as before stated. The position of the Board of Appeals in the three applications here involved is shown at the pages pointed out

by respondent (R. 63, 210 and 276) but do not support respondent's assertion. *The third paragraph on page 66 of the Record well sums up the Board's position,* and it simply tends to confuse settled issues to argue at this stage that admittedly novel articles are "taught" by disclosures fully considered prior to such admission.

It is further to be borne in mind that the Board did not have before it the pertinent new evidence in the present record which, *inter alia,* gave rise to the holding by the District Court that two of the claims there in issue involved patentable invention (R. 90). Among other things the Board did not have before it: (1) evidence to support the conclusions of the Court of Appeals as to the meritorious nature of the invention now established as proper (R. 308, lines 4-7); nor (2) the existence of the Robie or Paulson Patents (R. 95 and 303 A); nor, indeed (3) the pendency and status of the Oakes v. Robie and Oakes v. Paulson Interferences, which, in fact, though orally argued before the Examiners of Interferences on April 16 and 17, 1941, have not yet been decided, as of this writing.—Perhaps the Examiners of Interferences are left somewhat confused by the decisions of the court below on claims which are admittedly "substantially identical" (Respondent's Brief, page 5, lines 2-5) with the counts there under consideration.

(4) *Re last half of page 5 of respondent's brief:*—The contention of respondent in respect to the disclosure of the Benner patent also tends to confuse settled issues of facts, and to confuse the Commissioner's admission of novelty, as just stated above. The subject matter here claimed is a flexible abrasive article of the coated abrasive type, *e. g.,* abrasive belts or so-called sandpaper. The Benner patent (R. 268) does not at all concern such an article and purports only to involve an improvement in molded abrasive articles or emery wheels (R. 270, line 103, and R. 271, line 106);

also see the opinion of the court below in this connection (R. 308, end). Neither does the word "vinyl" even appear in the Benner *et al.* patent in connection with Benner's dissimilar article, and the court below recognizes (R. 309) that "there is much chemical authority" contrary to the contention that the styrol or styrene of the Benner *et al.* patent is a vinyl compound. In all events, the Benner *et al.* patent did not teach that sandpaper could be improved by the use of vinyl resins in any connection, for it teaches nothing about sandpaper; neither does it teach that vinyl resins, as a class, are useful in any connection whatsoever, for it does not even mention the same.

(5) *Re footnote on page 7 of respondent's brief:*—Respondent states that "Petitioner does not deny that there was substantial evidence to support a finding of no invention." Firstly, the trial court made no finding of fact, nor conclusion of law that there was "no invention" in the Oakes claims in issue (R. 85-90); neither did the trial court make any *fact* finding of no invention as to the Bartling claims (R. 280). Secondly, petitioner filed motions in the trial court for additional findings and for judgment (R. 91) and urged both before the trial court and the Court of Appeals that it is inconsistent with precedents and repugnant to justice here to deny patent protection on the inventors' admittedly novel, useful and advantageous contribution (R. 308) while similar and presumptively valid claims remain outstanding in the Robie, Paulson and Hepp patents, issued upon later filed applications; *inter alia*, see Petition for Rehearing (R. 312), Petition for Leave to File Bill of Review in District Court (R. 322), etc. It is not seen how Petitioner could have more emphatically denied that there is any substantial basis for a finding of no invention. On the other hand, Petitioner has consistently urged that the contrary conclusion is proper.

(6) *Re last half of page 8 of his brief:*—The respondent states that the cases cited by Petitioner (Pet. 11-12) are not in point because, he alleges, they "all involved a direct appeal from the Patent Office." This is inaccurate, as briefly noted hereinabove. In fact footnote 5 at the end of page 9 of respondent's brief demonstrates the inaccuracy of his own assertion.

Three decisions are cited by Petitioner (Pet. 11) involving appeals in action under Section 4915 R.S., namely:

Battery Patents Corp. v. *Coe,* 93 F. (2d) 220, at 226 and 227;

Gyro Process Co. v. *Coe,* 107 F. (2d) 195, at 200;

and

Robertson v. *Cooper,* 46 F. (2d) 766, at 769.

For convenient reference the following quotation from *Battery Patents Corp.* v. *Coe, supra* (Pet. 11) is given:

> "We are aware that this court has said that in case of a serious doubt in the mind of the court after a careful review of the evidence, the doubt should be resolved in favor of the one seeking a patent. *Application of Drew,* 55 App. D. C. 291, 4 F. (2d) 958 (1925); *In re Glafcke,* 51 App. D. C. 204, 277 F. 603 (1922); *In re Davidson,* 56 App. D. C. 279, 12 F. (2d) 814 (1926). It has also said that where there are, as here, concurring decisions of the patent tribunals, the court should be convinced beyond a reasonable doubt before reversing them that if a patent had been granted the court would upon the same record sustain it under attack. We are not doubtful under either of these rules that the application in the instant case should have been granted.
>
> "The decree of the District Court is Reversed."

This appears to fully answer respondent's assertion that the cases cited in the Petition "all involved a direct appeal from the Patent Office."

Several other decisions in appeals under R.S. 4915 might be cited, and in this connection it is desired to call attention to *Carbide & Carbon Chemicals Corp. et al.* v. *Coe,* 102 F. (2d) 236, at 241 and 242. This decision is particularly pertinent for several reasons: (1) The judge who wrote the dissent in that case wrote the majority opinion in the present case, while the judge who wrote the majority opinion there (concurred in by the Chief Justice) indicated his dissent on the merits in the present case. (2) A patent application was there under consideration having a later filing date than the *effective* record dates of the applications here involved, and the Court considered some of the same prior art here relied upon. (3) The chemistry of the case was somewhat similar in that vinyl resins were discussed, although food packaging was there involved while abrasive belts or "sandpaper" is here involved. (4) The majority of the Court, itself, there went into the question of "invention," and was not content with only determining whether there was some mere "rational basis" for the trial court's conclusion of no invention.

Moreover it is not seen why decisions in direct appeals are not likewise pertinent on the point in question: see *Morgan* v. *Daniels,* 153 U. S. 120 (Pet. 11); even see the last sentence in the opinion in *Abbott* v. *Coe,* 109 F. (2d) 449, at 452 (cited by the respondent), which holds that the normal presumptions of correctness apply as well to "administrative" as to "judicial" tribunals. (The decision in *Abbott* v. *Coe* was written by the same Justice of the court below who wrote the majority opinion in the present case.)

CONCLUSIONS.

The Justices of the Court of Appeals, D.C., are in conflict among themselves on the scope of appellate review in patent cases, and the majority opinion of the court which decided the present cases is inconsistent with the principles of appellate review laid down by this Court in *Powers* v. *Comm. of Internal Revenue,* 312 U.S. 259 (Pet. 16 and 23). They are in conflict among themselves as to the scope of appellate review *particularly* in respect to R.S. 4915 actions (compare the majority and dissenting opinions in *Carbide & Carbon* v. *Coe, supra,* with the majority opinion of said court in the present cases). The action of the majority of the court below in the present cases therefore constitutes such a departure from the accepted and customary course of judicial proceedings as to call for an exercise of this Court's power of supervision: *McCullogh* v. *Cosgrave,* 309 U.S. 634. There is even greater need in the present case to clarify and settle the law than in *Powers* v. *Comm. of Internal Revenue, supra,* because here it is impossible for such a case as this ever to be heard in any jurisdiction other than the District of Columbia (Pet. 18).

The reasonable doubt doctrine, heretofore consistently followed *without exception* in respect to all phases of patent application prosecution, and now for the first time not followed by a majority of the three Justices of the court below who heard this case, is of great importance to our patent system. There are broad practical and basic considerations in favor of retaining it. One consideration is that the burden of proof placed upon an inventor who seeks a patent should not be increased beyond what is reasonable and practicable; to do so would tend to encourage the secreting of inventions (instead of their disclosure) and the consequent retarding of progress. Further, Article I,

Section 8, Clause 8 of the Constitution itself weighs in favor of the reasonable doubt doctrine; it provides that:

> "The Congress shall have the power:
> * * *
>
> "To *promote* the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

It is not believed that it would be consistent with the apparent purpose of the Constitution, *viz.*, to *promote* or *encourage* inventions, and especially the disclosure thereof, if doubts were to be resolved against the inventor. It is believed that this provision of the Constitution may be the basic consideration underlying the more than fifty decisions (Pet. 12) in which *the reasonable doubt doctrine has previously been consistently followed,* with no exception, *both in appeals in actions under R.S. 4915 and in straight appeals from the Patent Office.*

In the Petition (heading 5, page 12) it was stated that:

> "This Court has never squarely passed upon the question of resolving doubts in favor of 'invention' or 'patentability,' though some of this Court's decisions have been judicially characterized as 'in point' on the familiar rule that, where doubt exists as to 'invention,' it should be resolved in favor of the inventor."

This statement was intended to be limited solely to cases involving *applications* for patents, and must be so limited to be accurate. This Court, in the case of infringement suits, has repeatedly upheld and enforced the principle of resolving doubts in favor of the inventor: see *Mumm* v. *Decker,* 301 U. S. 168, at 171; 81 L. Ed. 983, at 985, which squarely rules on this point and cites many prior decisions of this Court in support of said principle, such as *Cantrell* v. *Wallick,* 117 U.S. 689.

The fundamental errors of the majority of the Court of Appeals, D.C., and the failure of that Court properly to function as an appellate tribunal having been demonstrated in the Petition by discussion of specific assignments of error, which discussion is here supplemented, and Petitioner also being entitled to decrees on the merits, Petitioner prays that the decision of the court below be reviewed and reversed, and that writs of certiorari be granted to that end.

Respectfully submitted,

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HAROLD J. KINNEY,
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September 19, 1941.